United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1777

ORIGINAL

B
P/S

To be argued by
IRA JAY SANDS

In The

United States Court of Appeals

For The Second Circuit

ESTHER FRIEDLANDER, As Surviving Executrix of the Estate of Raphael Cohen,

Plaintiff-Appellant,

- against -

PETER I. FEINBERG, SAMUEL SOKOL, WEBB & KNAPP, INC., LOUIS ADLER, MARVIN GREENSPAN, WILLIAM ZECKENDORF, ZECKENDORF HOTELS CORPORATION, DRAKE ASSOCIATES, ALFRED KAPLAN, DOMAX SECURITIES CORP., PETER I. FEINBERG SECURITIES CORP., AGRIN LAWSON & HOLLAND and HARRIS, KERR, FORSTER & COMPANY,

Defendants-Appellees.

Appeal from Order of the United States District Court for the Southern District of New York

REPLY BRIEF FOR PLAINTIFF-APPELLANT

IRA JAY SANDS
Attorney for Plaintiff-Appellant
701 7th Avenue
New York, New York 10036
(212) 265-3500

STEVEN SISKIND
STANLEY YAKER
Of Counsel

(7491) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N. J. (201) 257-6850 | New York, N. Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D. C. (202) 783-7288

5

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

A US COURT OF APPEALS: SECOND CIRCUIT

FRIEDLANDER,

Plaintiff-Appellant,

- against -

FEINBERG,

Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF ss.:

I, James Steele, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 250 West 146th, Street, New York, New York

That on the 17th day of January 1975 at *

deponent served the annexed Reply Brief upon

*

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) . herein,

Sworn to before me, this 17th day of January 1975

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

James Steele

JAMES STEELE

* 1p

* Pollack & Singer-61 Broadway, NY

* Paul, Weiss-345 Park Ave., NY

* Mendes & Mount-27 William St., NY

* D'Amato & Costello & Shea-116 John St., NY

TABLE OF CONTENTS

PAGE

Table of Cases..... ii

Statutes..... v

Preliminary Statement..... 1

Argument..... 2

Conclusion..... 27

TABLE OF CASES

	PAGE
Adise v. Mather, 56 F.R.D. 492 (D. Colo. 1972)	16
Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972)	22,25
Bergen v. Kramarsky, 71 Civ. 5439, not officially reported (S.D.N.Y. 1971)	12
Bermudez v. U. S. Dept. of Agriculture, 490 F.2d 718 (D.C. Cir. 1973)	13
Carmi v. Delta, 72 Civ. 1095, not officially reported (S.D.N.Y. 1972)	12
Carracter v. Morgan, 491 F.2d 458 (4th Cir. 1973)	16
Carrol v. Amer. Federation of Musicians, 372 F.2d 155 (2d. Cir. 1967)	20
City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969)	11,14
Cohen v. Tenney, not officially reported, Dkt. #67 Civ. 4187 (S.D.N.Y. 1971)	17
Crane Company v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969) cert. den. 400 U.S. 822 (1970)	22
Crasto v. Est. of Keskel, CCH Fed.Sec.L.Rep. P. 94,524 (S.D.N.Y. 1974)	26
Dienstag v. Bronsen, not officially reported, Dkt. #68 Civ. 576 (S.D.N.Y. 1972)	16
duPont v. Perot, 59 F.R.D. 404 (S.D.N.Y. 1973)	20
Eisen v. Carlisle & Jacquelin, 391 F. 2d 555 (2d Cir. 1968)	6,14,19

	PAGE
Epstein v. Weiss, 50 F.R.D. 387 (D.C. La. 1970)	22
Escott v. Barchris Corporation, 340 F.2d 731 (2d Cir. 1965), cert. denied 382 U.S. 816 (1966)	14,22
Feder v. Harrington, 52 F.R.D. 178 (S.D.N.Y. 1970)	18
Free World Foreign Cars, Inc. v. Alfa Romeo, S.p.A., 55 F.R.D. 26 (S.D.N.Y. 1972)	20
Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931)	26
Glodgett v. Betit, 368 F.Supp. 211 (D.Vt. 1973)	18
Gneiting v. Taggares, 15 F.R.Serv. 2d 311, CCH 1973 Trade Cases P. 74,440 (D. Idaho 1973)	24
Green v. Wolf Corporation, 406 F.2d 291 (2d Cir. 1968), cert. den. 395 U.S. 977 (1969)	6,14,19
In re Swan-Finch Oil Corp., 279 F.Supp. 386 (S.D.N.Y. 1967)	18
Kahan v. Rosentiel, 424 F.2d 161 (3rd Cir. 1970), cert. den. 398 U. S. 950 (1970)	15,23
Lah v. Shell Oil Co. 50 F.R.D. 198 (S.D. Ohio 1970)	24
Lamb v. United Security Life Company, 59 F.R.D. 25 (S.D. Iowa 1972)	5
Matarazzo v. Friendly Ice Cream Corporation, 62 F.R.D. 65 (E.D.N.Y. 1974)	20

	PAGE
Matter of Redwood Furniture Company, Inc., 248 F.Supp. 228 (W.D.N.C. 1965)	8
Mersey v. First Republic Corporation, 43 F.R.D. 465 (S.D.N.Y. 1968)	5,15,19
Mills v. Electric Auto Lite Co., 396 U.S. 375 (1970)	23
Morris v. Burchard, 51 F.R.D. 530 (S.D.N.Y. 1971)	24
Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D.Pa. 1968)	4
Poindexter v. Teubert, 462 F.2d 1096 (4th Cir. 1972)	15
Rochez Bros., Inc. v. Rhoades, 491 F.2d 402 (3rd Cir. 1974)	25
Rossin v. Southern Union Gas Co., 472 F.2d 707 (10th Cir. 1973)	15
Ruggiero v. American Broculture, Inc. 56 F.R.D. 93 (S.D.N.Y. 1972)	21
Schaffner v. Chemical Bank, 339 F.Supp. 329 (S.D.N.Y. 1972)	23
Snyder v. Harris, 394 U.S. 332 (1969)	2
Speros v. Nelson, 16 F.R.Serv. 2d 1506 (D. Ore. 1973)	23
Taub v. Glickman, CCH Fed.Sec.L.Rep. P. 92, 874 (S.D.N.Y. 1970)	16
United Airlines v. Wiener, 286 F.2d 302 (9th Cir. 1961)	25
Wilcox v. Commerce Bank, 55 F.R.D. 134 (D. Kan. 1972) aff'd 474 F.2d 336 (8th Cir. 1973)	14
Wolf v. Frank, 477 F.2d 467 (5th Cir. 1973) cert. denied 414 U.S. 975 (1973)	6

STATUTES

	PAGES
Rule 23, Federal Rules of Civil Procedure	3,14
Civil Rule 11A, Civil Rules of the United States District Court for the Couthern District of New York	12,13,14
Bankruptcy Act, Section 17 (11 USC Sec. 35)	8
Title 28, United States Code, Sec. 1292	4

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -*

ESTHER FRIEDLANDER as Surviving Executrix of the Estate of Raphael Cohen,

Plaintiff-Appellant,

-against-

PETER I. FEINBERG, SAMUEL SOKOL, WEBB & KNAPP, INC., LOUIS ADLER, MARVIN GREENSPAN, WILLIAM ZECKENDORF, ZECKENDORF HOTELS CORPORATION, DRAKE ASSOCIATES, ALFRED KAPLAN, DOMAX SECURITIES CORP., PETER I. FEINBERG SECURITIES CORP., AGRIN, LAWSON & HOLLAND and HARRIS, KERR, FORSTER & COMPANY,

Defendants-Appellees,

NO. 74-1777

On Appeal from an Order of the United States District Court for the Southern District of New York

- -*

REPLY BRIEF OF PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

This brief is in reply to answering brief of Defendants-Appellees. In her main brief, Plaintiff-Appellant presents the question as to whether the District Court erred in denying her motion for class designation. Plaintiff adheres to her main brief and the question and arguments there presented, and will where possible reduce repetition of points

discussed therein.

However, Defendants-Appellees, Feinberg, et. al., have, in addition to the issue presented to this Court for review, raised collateral issues, not properly before this Court, but which we will have to devote space to discuss infra. In addition, while they have made statements and assumptions not supported by the record, the facts are before this Court in the record and Appendix.

There are several Defendants-Appellees represented by various counsel. This reply brief will deal primarily with the brief of Defendants-Appellees Feinberg, et.al., (hereinafter referred to as "Feinberg Defendants" or "Defendants",) who have borne the laboring oar on behalf of all Defendants and since Defendants have all adopted the Feinberg brief herein.

ARGUMENT

The Court below denied class status solely on the narrow basis of untimeliness of the motion and absence of diligent prosecution (A-217, 222). The issue is whether on the facts, the Court erred in its determination. Plaintiff contends it did, and despite attempts by the Defendants to encompass other matters (including the statute of limitations issue previously decided against them) that the scope of this appeal should be thus narrowly consid-

ered, especially since Judge Ward had all the other factors before him and did not find them against plaintiff.

Defendants make many unsupported allegations in posing the issues.

Thus, at Page 2 in question 1, Defendants allege as fact that the Rule 23 motion was brought "on the eve of trial and there was no actual justification for the delay." As stated in Plaintiff's main brief, trial was not imminent. There was ample justification for delay. That is the whole point in controversy here. Further, as indicated by Feinberg defendants themselves (Feinberg brief, Page 5, lines 12-13) the matter was not on eve of trial as Plaintiff had not "even begun pretrial discovery against any of the 13 Defendants." This is also erroneous as noted Page 7, infra.

Similarly, question 2 posed by Defendants assumes Judge Ward's decision was based on factors not contained therein and further assumes that Plaintiff's interests conflict with the best interests and wishes of all other class members. There is nothing in the record to indicate that Plaintiff's claim conflicts with the best interest or wishes of all other class members, nor was this held by Judge Ward. The sole point in issue on this appeal is whether the delay was justified.

Finally, Defendants' question 3 is merely an attempt to appeal denial of their summary judgment statute of limitations motion ; the threshold motion which was a major cause for delay. Judge Ward denied Defendants' limitations motion after extensive briefing and long oral argument during which the parties discussed when the "average" Drake investor, not merely Cohen alone, should have become sufficiently apprised of the violations alleged. Now Feinberg seeks to re-open that issue and re-argue the limitations issue anew. It is interesting to note that in briefing their question and urging it herein, Defendants are trying to resurrect on appeal an issue which, by virtue of Federal statute is not otherwise appealable. (28 U.S.C. §1292). The limitation question has already been decided below (369 F. Supp. 917) which does indicate that this issue should await trial. Further, the fact that limitations questions will have to be determined on an individual basis as to each member of the class is not a bar to a class action, even one of 1100 persons. Were this the case, virtually the bulk of securities fraud class actions would not be maintainable as there are, in all such cases, multitudes of individual purchasers with separate purchase dates. See Philadelphia Electric Co. v. Anaconda American Brass, 43 F.R.D. 452, 460 (E.D. Pa 1968). Such a door-opener would create a precedent which may emasculate utilization of the class vehicle as Congress envisioned, or never permit finality to an issue already tried in depth. As stated in

Lamb v. United Security Life Company, 59 F.R.D. 25, 35 (S.D. Iowa 1972):

> "...the Court has no intention, in making a Rule 23 determination, of adjudicating whether certain representatives of the class have a cause of action, or a possiblility of prevailing on the merits, or whether they are barred by the statute of limitations, by a weakness in their case, or for any other reason. To do so would, first of all, completely subvert the requirements and standards set forth for motions to dismiss and motions for summary judgment under F.R.C.P. Rules 12 and 56, as well as those of Rule 23 itself by importing the requirements of F.R.C.P. Rule 65 (preliminary injunctions) thereinto. Rule 23 simply does not call for the sort of inquiry that defendants suggest."

Among the unsupported contentions of Defendants is that Zeckendorf was "a peripheral defendant" and therefore should have been dispensed with by plaintiff for the purpose of continuing the litigation. That defendants recognize that this is not so is noted at Page 3 of the Feinberg brief where they say: "The transaction involved the formation of a limited partnership which purchased the Drake Hotel from and leased it back to corporations controlled by William Zeckendorf (A-35-36)", That Zeckendorf is central to Plaintiff's case, as are Feinberg defendants, is indicated in the record and Appendix.

Feinberg, Page 3, indicates that no other limited partner sought to join the class action. Yet, joinder by other class members is not required for class action. (Mersey v. First Republic Corporation, 43 F.R.D. 465,470,471(S.D.N.Y. 1968);

Green v. Wolf Corporation, 406 F. 2d 291,298 (2d Cir. 1968); Cert. denied 395 U.S. 977; Eisen v. Carlisle & Jacquelin, 391 F. 2d 555, 563 (2d Cir. 1968). (Eisen II).

Defendants, Page 4, make additional unsupported statements as if fact. For example, it is in direct conflict as to whether arrears were ever fully paid to investors or if full distributions were resumed, or whether, at time of sale of Drake Hotel, the Zeckendorf tenant had fully met lease obligations. It is in issue whether a profit or a loss was ultimately produced. Yet it is not in issue that many class members, like Plaintiff Cohen, sold their units at a loss due to the actions of Defendants. As admitted in their affidavit in opposition to the class motion (A-155-156), 500 of 1074 Drake units were sold or transferred. Those who sold never received any later distributions and will not receive any further money except by way of this action. Plaintiff contends this large group needs protection.

Many cases cited by Feinberg in support of their position do not pertain to issues herein nor to propositions for which Feinberg cites them. Wolf v. Frank, 477 F. 2d 467, 478, 479 (6th Cir. 1973), cert. den. 414 U.S. 975 (1973), (Feinberg, Page 4, ftn.) is cited for the proposition that even if Plaintiff continues to trial "...she will not be able to prove any damages as to almost all of the purported class, who, unlike plaintiff still own their partnership interests" and

therefore the entire case is legally futile. Further, Wolf does not stand for the proposition cited. It was a Rule 10b-5 violation case dealing with dilution of shareholders interest as a measure of damages which admits to conflict within the circuits on even that point. Indeed, the earlier Feinberg admission directly contradicts this "new" fact in the Feinberg brief. Similarly, there is nothing in the record to sustain Feinberg's statement (p.5) that maintenance of this questionable action is contrary to interest of and is prejudicing the other limited partners by preventing their prompt recoupment of their investment and profit." Additionally, Feinberg's statement that Plaintiff has not begun discovery against any defendants is inaccurate. Plaintiff commenced document discovery of Feinberg when permitted. Further discovery was prevented by the repeated use of the Zeckendorf stay and summary judgment motion.

Rather than continue to burden this brief with recitation of inaccurate statements by Defendants, Plaintiff stands on the main brief, except to reiterate that the record shows that Plaintiff had valid reasons for not earlier making the class motion.

As to the bankruptcy stay, Feinberg claims there were two options open to Plaintiff which would obviate the stay problem. Feinberg argues that since Plaintiff did not pursue these, she was dilatory and the stay not a bonafide

reason for delay. However, the first "option" was to discontinue against all Zeckendorf defendants (whether with or without prejudice is here immaterial). This was not a viable option. Zeckendorf was not "peripheral" but central! The action could not be divided in half. There would be no point to continue the action and seek class status without a key group of Zeckendorf defendants. Further, the second "option" to apply to Referree Herzog to lift the stay "since it involves a claim of fraud and the damages sought are unliquidated in amount" would also be futile. (A-44, p. 19). Defendants cite Matter of Redwood Furniture Company, 248 F. Supp. 228, 232 (W.D. N.C. 1965). However, it can be argued that the fraud alleged in the action at bar is not of the type which the Bankruptcy Act, Section 17 (11 U.S.C.A. §35) fails to discharge specifically. The Bankruptcy Act provides: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts...except such as...(4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or any fiduciary capacity..." The statute may or may not apply to the facts here. Plaintiff could not take the chance on future interpretation and thus flout the Referee Herzog stay, especially after the reported inquiry by Plaintiff to his Chambers. (A-44,¶19).

In addition there was so much litigation involving the Zeckendorf empire that despite unsupported allegations in

brief here by Zeckendorf and Feinberg, as a practical matter it would have been totally fruitless for Plaintiff to try to upset or avoid the bankruptcy stay since the Referee could not logically open the floodgates to allow this action to proceed and still keep back the other actions against the Zeckendorf empire, some by secured claimants.

The record indicates that as early as September 3, 1970, Defendants' counsel stated: "...we were then going to test the issue of the statute of limitations before any further proceedings in the action were taken." (Plaintiff-Appellant's brief, Page 9 and A-210). Thus, the summary judgment motion is not a "mere after-thought" as now stated by Feinberg. How, therefore, can Feinberg, on May 31, 1972, claim no knowledge of why Plaintiff refrained from making class application, when in September, 1970, they acknowledged that they were going to test the limitations issue prior to further proceedings?

Feinberg defendants claim (p. 9) that the summary judgment motion was denied -- "...on the ground that plaintiff's answers to interrogatories were 'unresponsive' and raised fact questions as to when plaintiff's decedent had actually realized that he was allegedly defrauded. (See opinion reported at 369 F. Supp. 917, 918)" (Feinberg brief, Page 9). This statement is not even remotely correct! It is not there! The Court just did not decide summary judgment <u>against</u> Defendants because the

responses were inadequate. Nothing in the Court's holding on summary judgment is based on Plaintiff's interrogatory answers as unresponsive. In fact, discussing the interrogatories, the Court stated at Page 919:

> "The Court does not agree that these so-called 'admissions' (in the interrogatory responses) are sufficiently clear and unambiguous to support the conclusion at this stage of the litigation that there are no disputed issues of fact, thereby permitting the dismissal of the complaint as a matter of law." (Parentheses supplied)

In a footnote the Court speaks of answers to interrogatories, and then only as follows:

> "Although these answers <u>appear to be somewhat unresponsive</u> they admit only that Raphael Cohen learned of the poor financial condition of the Zeckendorf entities in 1963-1965." (Emphasis supplied)

Despite Feinberg's references that Plaintiff failed to file timely notice of appeal and obtained Court reprieve for that lapse, it is noted that this Court (over Feinberg's objection) found excusable that the notice of appeal was timely served and filed one business-day late by the office clerk. Further, extensions of time on an appeal are frequently granted especially as here where needed due to notice of death of a co-Plaintiff, and delay in determining whether this action would proceed without him.

As to Feinberg defendants contentions that Judge Ward's decision did not constitute clear abuse of discretion, they seem to feel that citing a great many cases, even if erroneously or not in issue, supports their position. Thus, they state the obvious -- the decision to grant class status is discretionary and further that in absence of clear error of law, the District Judge will not be reversed. This, however, is not the law where the District Judge is wrong, as indicated even by cases cited by Feinberg. In the case at bar, we are not dealing with mere error of law, but with misapprehension of fact and misapplication of law below.

In City of New York v. International Pipe & Ceramics Corp., 410 F. 2d. 295, 297 (2nd Cir. 1959) cited by Defendants, this Court affirmed denial of class status where it found that:

> "During argument, the Court covered the many factual elements which he felt should control his judgment as to whether this action should be regarded as, and continue as, a class suit."
> (Underscoring supplied)

In City of New York the trial judge (Ryan) examined interrogatories and answers over a period of many weeks and heard extensive oral argument on the class action issue and decided that treatment of the suit as a class action was not proper.

Indeed, during oral argument, Judge Ryan stated "that he had 'simply held that this suit under the facts here, the undisputed facts, does not require and does not dictate that it be given class treatment'". Supra, at 298. This

Court then found that "...the judgment of the trial judge should be given the greatest respect and broadest discretion, particularly if, as here, he has canvassed the factual aspects of the litigation" (at 298).

This is precisely what Plaintiff contends was not done by Judge Ward, else how would Judge Ward ignore the record that the Zeckendorf stay was one predominant factor in Plaintiff's motivation and that Defendants' limitations motion was an even more important part thereof, and further, totally ignore Defendants' letter of September 3, 1970 (A-210) in which Feinberg indicated that the issues of limitations must be resolved before any other issues would be undertaken, and most importantly, completely omit from consideration the effect of Local Rule 11A (d) (as pointed out in main brief of Plaintiff.)

The two cases cited as decided after adoption of Local Rule 11A (Bergen v. Kramarsky, 71 Civ. 5439 (n.o.r.) and Carmi v. Delta , 72 Civ. 1095 (n.o.r.), while involving only a minimal delay beyond the 60-day period, indicate clearly that the 60-day Rule must be utilized in flexible fashion. Do Feinberg defendants contend that perhaps 25 days beyond the 60-day limitation is allowable, but 26 is not; or 300 days is permissable,but 301 removes the Court's discretion? The point is that Local Rule 11A is not interpreted inflexibly as to mandate automatic denial in the event class determination is not sought within 60 days.

But if Local Rule 11A is so inflexible, then those responsibilities placed on Defendants, by Sub-Section 11A (d) must be equally weighed in the very same balance. Rule 11A (d) places as stringent a duty upon the party opposing class as upon its proponent, to take some action within precise deadlines. It is uncontroverted that our defendants took no such action despite their knowledge that this action was intended as a class action. Thus, this bolsters Plaintiff's contention that Defendants as well as Plaintiff recognized the agreed priorities as to the limitations motion as well as the necessary delay because of the Zeckendorf stay. Why else would astute Defendants not have made their Rule 11A (d) application or the Court moved on its own?

Plaintiff will not further repeat the Local Rule 11A (c) and (d) problem posed by the opinion below, other than to note that Defendants have been unable to respond to it at all.

Of course, we agree with Bermudez v. U.S. Department of Agriculture, 490 F. 2d 718, 725 (D.C. Cir. 1973) cited by Feinberg, where the Court stated, in discussing the determination of the trial judge:

> "...if he applies the correct criteria to the facts of the case, the decision should be considered to be within his discretion."

We note that Bermudez also qualifies the condition for class determination being considered within the lower Court's discretion. Again, this is precisely the point made by Plaintiff, that the Court below did not apply correct legal criteria to facts of this case.

In City of New York, supra, pp. 300-301, in a dissent particularly applicable to the facts at bar, Judge Hays stated:

> "...as to those members of the class for which the action has been determined the order below is precisely that 'death knell of the action' that the Eisen I holding of appealability was designed to prevent. See also Green v. Wolf Corp. 406 F 2d 291 (2d Cir. 1968)."

Judge Hays further noted that new Rule 23 under Eisen II and Escott v. Barchris, 340 F. 2d 731 (2d Cir. 1965) should be given liberal rather than restrictive interpretation and that:

> "...excessive defference to the District Court has led the majority to disregard the provisions and the intent of Rule 23 and the authority of the Eisen cases." (at 301)

The same rationale applies in the instant case. Feinberg goes on to cite Wilcox v. Commerce Bank of Kansas City, 55 F.R.D. 134, 136-137 (D. Kan. 1972) aff'd 474 F. 2d 336 (10th Cir. 1973), where the Court held that on the precise facts of that case (involving the Truth In Lending Law) class status be denied. However, the Court's opinion dealt exhaustively with application of Rule 23 to the Federal Truth In Lending Law in a case distinguishable from ours. Wilcox did note that: "...a Plaintiff's burden of satisfying the prerequisite of the rule for the maintenance of the class action does not involve convincing demonstration of the merits of his underlying cause of action." (at 345). This is contrary to

Defendants' assertion that Plaintiff has failed to already establish the merits of his cause. See also Mersey v. First Republic Corp. of America, supra, p. 5; Kahan v. Rosentiel, 424 F. 2d 161, 169 (3d Cir. 1970).

Plaintiff agrees she had the burden of proof as to class status. Plaintiff contends she fulfilled that burden and the learned Court below only faulted her because of delays, not other criteria, all of which were amply briefed by both sides below.

Although Plaintiff agrees the burden of proof of class entitlement is on party asserting class, the cases cited by Defendants (footnote, p. 18) are inapplicable on the facts. In Rossin v. Southern Union Gas Co., 472, F. 2d 707, 712 (10th Cir. 1973), Plaintiff made no offer to show that any requisite of Rule 23 was satisfied but merely asserted she was "an individual who has arrayed herself against a large public utility with peculiarly great resources of information regarding this action and the class for whom it was brought."

Also, Poindexter v. Teubert 462, F 2d 1096, 1097 (4th Cir. 1972), was a class action against police officials for deprivation of a black person's rights in which the plaintiff did not show that defendants had engaged in similar practices to other black citizens, unlike the class facts shown by our Plaintiff.

Plaintiff's main brief has dealt with Taub v. Glickman, CCH Fed. Sec. L. Rev. ¶92,874 (S.D.N.Y. 1972) (n.o.r.) and Dienstag v. Bronson, Docket No. 68 Civ. 576 (S.D.N.Y. 1972) (n.o.r.), cited by Feinberg (Page 14). Adise v. Mather, 56 F.R.D. 492 (D.Col. 1972) is cited by Feinberg for the proposition that denial of class certification is warranted where plaintiffs fail to move promptly and are otherwise dilatory. In Adise, unlike our case, the Court found that no reason or excuse was provided for not making class motion until 21 months after commencement, with no excuse offered. Adise is inapplicable to the facts at bar. In addition, in Adise, the Court found fatal that plaintiff would not adequately represent interests of the class since he refused to have as defendant the accountants involved, since they were also his own accountants.

Carracter v. Morgan, 491 F. 2d 458 (4th Cir. 1973) is distinguishable from the case at bar. Plaintiffs, members of a chain gang, failed even to bring to the trial court's attention at any time the matter of determination of class status. This is certainly again not the case at bar where Plaintiff first requested class status in the Complaint (A-11) and Paragraph (e) of the Prayer for Relief in the Complaint. (A-31).

The Feinberg brief continues to restate the obvious as they note that almost four years elapsed between commencement of this action and formally moving for class. This is true, but

as noted in Plaintiff's main brief which Plaintiff contends is supported by the record, there was justifications established for delay.

Further, while Plaintiff did not appear for one early pre-trial conference, Defendants also did not appear and were late for conference but the Court below ignores this.

Nor did Plaintiffs alone cancel depositions. Feinberg defendants cancelled many as well. As to the contention that answers by Plaintiffs to Feinberg's interrogatories were on the face inadequate, Defendants never moved with respect to this despite ample opportunity, nor, as previously noted, did the Court below ever receive papers or have argument or discussion and then characterize them as totally unresponsive.

Further, as noted in Plaintiff's main brief, it would not have served any purpose to have disputed Feinberg's contention that the limitations issue was "threshold" and must precede a class motion or merits discovery, since had the summary judgment been decided in favor of defendants, there would have been no action remaining.

While this Court will make its own determination of applicability of cases cited, we must indicate that as Feinberg defendants misinterpreted their own cases, so did they misinterpret those cited by Plaintiff. In trying to distinguish Cohen v. Tenney, Docket No. 67 Civ. 4187, (HRT), (n.o.r.),

Feinberg claims they have amply shown prejudice because of the delay. However, Defendants show no prejudice by delay of the class motion other than their statements to that effect, contradicted as to "investor-sellors" by their own affidavit (A-156).

Plaintiff's reliance on Feder v. Harrington, 52 F.R.D. 178 (S.D.N.Y. 1970) is justified. The additional quotation from that case cited by Defendants has no effect since the entire issue at bar is whether there is an accurate showing that our motion was not made as soon as practicable, 28 days after the Court denied summary judgment.

We agree with Defendants that as in Glodgett v. Betit, 368 F. Supp. 211 (D.Vt. 1973), and In Re Swan-Finch Oil Corp, 279 F. Supp. 386, (S.D.N.Y. 1967) plaintiff must do more to obtain class certification than merely file a face page class action captioned complaint.

However, in the case at bar, Plaintiff has done a great deal more than that, not the least of which is an initial complaint section devoted to class allegations, a demand for class as noted, and also in discussions early in the case and before theCourt below at pre-trial conferences.

Defendants allege Plaintiff's claims are atypical and make an unsupported assertation that plaintiff appears antagonistic to other class members, citing that no other limited

partners expressed interest in this action. Simply as a matter of law, non-visible interest by other members does not preclude plaintiff from being a proper representative. Mersey v. First Republic Corp., supra, p.5; Green v. Wolf Corp.; Eisen v. Carlisle and Jacquelin, supra, p.6.

Additionally, defendants offer as a significant argument that if the decision below be reversed, the other investors will be prejudiced and the action would be directly contrary to their interests since the partnership will not be able to make distribution now. Aside from the fact that Plaintiff and approximately one-half the other class members did sell at a loss, as a result of the alleged wrongdoings, if Defendants were to now distribute the assets, that one-half would go to new people who brought distressed units from original purchasers who were damaged. These new holders may receive a windfall, which should actually go to all original prospectus purchasers like Plaintiff.

There has been no class discovery which enables anyone to determine the true number of class members who sold and were damaged. Thus plaintiff is antagonistic only to the non-member newcomers, who would be unjustly enriched by a wrong distribution. In such circumstances plaintiff maintains that her action is representative of interests of the class and not antagonistic to the class. The case cited by Feinberg on p. 20,

Carroll v. American Federation of Musicians, 372 F. 2d 155 (2d. Cir. 1967) is distinguishable. It was decided prior to amendment of Rule 23 eliminating distinctions between "true" and "spurious" class actions, and the Court found Plaintiff did not represent the true class in a case where members of the class (union Orchestra Leaders)were in differing situations, (i.e. some full-time, some part-time, some un-willing and some active union members who agreed with union policy.)

Likewise Matarazzo v. Friendly Ice Cream Corp., 62 F.R.D. 65 (E.D.N.Y. 1974) is distinguishable. It deals with a purported class action by a former store manager on behalf of former as well as present and newly-promoted managers. The Court found their interest antagonistic, unlike the case at bar, because certain members clearly were opposed. Not so at bar, where those opposed would be only non-members who bought recent windfall units.

duPont v. Perot, 59 F.R.D. 404 (S.D.N.Y. 1973) is distinguishable as a case in which plaintiffs interest was found to be contra an agreement actually signed by over 90% of his purported class. Freeworld Foreign Cars v. Alfa Romeo, 55 F.R.D. (S.D.N.Y. 1972) is distinguishable as an anti-trust class action in which a former franchisee was found to have interests not consistent with present franchisees who depended upon the continued economic well-being of the company. Not so here, where the class is solely investors who bought on a prospectus.

In Ruggiero v. American Bioculture, Inc., 56 F.R.D. 93 (S.D.N.Y. 1972), plaintiff brought action both derivatively and representatively. That Court in denying class status noted plaintiff could not vigorously seek recovery on behalf of those who have an equity interest in the corporation on the one hand, and on the other hand vigorously seek recovery from the corporation for those without equity interest.

Feinberg additionally claims there are predominant non-common issues which render this action non-class (p. 22). This is not the case. Further, this is not appropriate for review on this appeal as the denial below is based on the narrow ground of delays, and this is all that should be here reviewed. However, their claims cannot go unanswered here.

Defendants allege that even if the District Court is found to have abused discretion with regard to the decision, the order appealed from should nevertheless be affirmed since there are predominant non-common questions. This is wrong. There are substantial common questions of law and fact. The complaint alleges omissions and misrepresentations in the one prospectus utilized by defendants for issuance to every member of the class which relate to all members of the class in the same manner. Existence and materiality of such omissions and misrepresentations, as alleged in the complaint, obviously present material common issues of fact and then of law to every class

member. Escott v. Bar Chris, supra, p. 14.

Plaintiff further contends that defendants knowingly conspired to fraudulently offer and sell securities to the public and while doing so kept certain specific damaging conduct from the class members (A-20-26).

Additionally, Plaintiff is typical of the class. The complaint alleges that defendants prepared and filed with the SEC a registration statement in purported compliance with the 1933 Securities Act, for purposes of effecting public distributuion of the securities, and engaged in a continuing scheme to unlawfully and artifically maintain the public market price of Drake units, by use of instruments of transportation and communication in interstate commerce and mails, and Defendants employed devices to defraud and made untrue statements of material facts. Defendants engaged in a course of business which operated as (and which defendants knew it would) a fraud and deceit upon public investors such as plaintiff and the class. This conduct is precisely typical of the claim of every class member. Further, since plaintiff alleges numerous detailed prospectus omissions (A-20-26), reliance is unnecessary. One cannot rely upon an omission! Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); Epstein v. Weiss, 50 F.R.D. 387 (D.C. La. 1970), Crane Company v. Westinghouse Air Brake Co.,419 F. 2d 787, 797 (2d Cir. 1969); cert. den. 400 U.S. 822 (1970); also, reliance

has been viewed as resting upon materiality. Kahan v.Rosenteil, supra, p. 15 ; Mills v. Electric Auto-Lite Co.,396 U.S. 375 (1970).

Indeed, these issues were all before the Court below which did not find any against Plaintiff and they should not be here again reviewed.

Defendants contention that a class action jury trial would not be in interest of efficient administration is also an issue outside scope of review here. Evidently, Judge Ward did not agree below. However, plaintiff has heretofore indicated informally to Feinberg and reiterates here that she would be willing to waive a jury.

To this extent, Feinberg's citation of Speros v. Nelson 16 F.R. Serv. 2d 1506, (D. Ore. 1973) is not persuasive. Schaffner v. Chemical Bank, 339 F. Supp. 329 (S.D.N.Y. 1972) is easily distinguishable in that it involves attempted class assertion by an income beneficiary of a personal inter-vivos trust against the trustee for alleged violations of anti-trust and securities statutes on behalf of herself and all persons and institutions who have been beneficiaries of trusts in which defendants effect securities transactions; in other words, for trusts in which plaintiff had an interest and also those in which plaintiff did not have an interest. The Court does not at all deal with statute of limitations which is the proposition

for which this case is cited by Feinberg. (p. 22), although it is correctly quoted as to the jury issue at Page 25.

Gneiting v. Taggares, 15 F.R. Serv. 2d 311, CCH 1973 Trade Cases ¶74, 440 (D. Idaho, 1973) is likewise distinguishable and does not deal with statute of limitations, but again with class management of a jury trial. There, plaintiff attempted to being a class motion on behalf of two distinguishable and distinct groups, unlike at bar where there is one cohesive class of prospectus buyers. Further, in Gneiting, as noted by that Court, failure to uphold class would not terminate the litigation. It did not fall within the death knell situation as does the case at bar.

Morris v. Burchard, 51 F.R.D. 530 (S.D.N.Y. 1971) is cited by Feinberg for the proposition that class action treatment has been denied in jury cases where there are individual issues as to reliance. In Morris, however, class was allowed on one count and not on the other because the fraud alleged was not the same to all members; it was not a case dealing with fraudulent written financials or omissions therefrom, but with varying oral statements made at different times to different people. The case at bar involves only one written Drake prospectus.

Lah v. Shell Oil Co., 50 F.R.D. 198 (S.D. Ohio, 1970) is distinguishable as it was an anti-trust class action in which defendants asserted a non-frivolous counterclaim. In fact,

there were many separate questions of fact. It was not even like the common anti-trust case in which class is allowed due to one common conspiracy. The case dealt with Shell Oil franchises and different requirements upon individual station owners by Shell.

United Airlines v. Weiner, 286 F. 2d 302, 306 (9th Cir. 1961) was a negligence case involving a mid-air crash between a Government plane and a passenger plane. The Court held that separate trial of the damage issue, apart from liability, could not proceed without injustice because the two issues were too closely interrelated. It is easily distinguishable from our case at bar, on the mere facts.

Rochez Bros., Inc.v. Rhodes, 491 F. 2d 402, 410 3rd Cir. 1974) is cited by Feinberg in a footnote (p. 24) for the proposition that even if Plaintiff does not have to affirmatively prove reliance, Defendants have the right to disprove it. Feinberg insists that Defendants at bar will try to do so; yet reliance need not be proven since it is not an issue on the omissions. Affiliated Ute Citizens, supra. Furthermore, their argument is sham because each investor signed an agreement with the Feinberg group acknowledging receipt of the prospectus and affirming that the investor was relying only upon the prospectus, and not on any oral statement. That document prepared by the Feinberg group to protect them from later claims of

oral promises, now binds Defendants and results in Defendants waiver of any defenses of reliance.

Defendants cite Gasoline Products, Co. v. Champlin Refining Co., 283 U.S. 494 (1931) for the proposition that all issues have to be submitted to and determined at a single jury trial where questions of damage. reliance, etc. are interwoven with the facts of the case. The Court in Gasoline Products did find on the particular facts of the case a new trial of all issues was proper (yet Plaintiff at bar is waiving a jury). However, the Court clearly indicated that a new trial may be had on separate issues (p. 499):

> "Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again."

Snyder v. Harris, 394 U.S. 332 (1969)is cited by Feinberg (ftn. p. 24) for the proposition that Rule 23 cannot be interpreted to deprive any party of a substantive litigative right. It dealt with aggregating sums to reach the federal jurisdictional amount of $10,000. Plaintiff does not dispute the contention that Rule 23 cannot deprive a party of a substantive litigative right. That is not now at issue here.

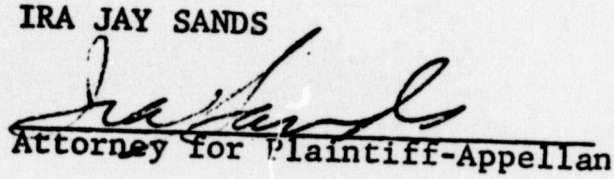
Additionally distinguishable is Crasto v. Est. of Keskell CCH Fed. Sec. L. Rep. ¶94, 524 pp. 95, 810 (S.D.N.Y. 1974) (n.o.r.) which dealt with fraudulent oral misrepresentations to different people at different times, not parallel to the case at bar.

CONCLUSION

For the reasons stated in Plaintiffs main brief and in this reply brief, the District Court erred in denying class status to Plaintiff. The order appealed from should be reversed.

Respectfully submitted,

IRA JAY SANDS



Attorney for Plaintiff-Appellant

Of Counsel:

STEVEN SISKIND
STANLEY YAKER

A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

US COURT OF APPEALS: SECOND CIRCUIT

FRIEDLANDER,
Plaintiff-Appellant,

against

FEINBERG,
Defendants-Appellees.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Karen Giles, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1013 East 180th Street, Bronx, New York 5

That upon the ~~xxth~~ 20th day of January 1974, deponent served the annexed Reply Brief

upon * attorney(s) for

in this action, at *

the address designated by said attorney(s) for that purpose by depositing 2 (two) true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this ~~xxth~~ 20th day of January 1974

Karen Giles

Print name beneath signature

KAREN GILES

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

*Pollack & Singer-61 Broadway, N
* Paul, Weiss- 345 Park Ave., NY
* Mendes & Mount-27 William St., NY
* D' Amato & Costello & Shea- 116 John St., NY